Honorable Palmer Robinson
Tuesday, Jan. 11, 2005
8:30 a.m.
With oral argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

1000 FRIENDS OF WASHINGTON, KING COUNTY, and CENTER FOR ENVIRONMENTAL LAW AND POLICY Plaintiffs, vs. RODNEY McFARLAND, Defendant.	No. 04-2-37112-1 SEA PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

1. *Anderson, Brisbane* and *Yes for Seattle* resolve all relevant issues before the Court.

Consideration of this summary judgment motion is controlled by well-established precedent. The Supreme Court has unequivocally held that a County's land use development regulations are not subject to ballot measures (either initiatives or referenda). *Snohomish County v. Anderson*, 123 Wn.2d 151, 156-59 (1994) (*Anderson I*); *Brisbane v. Whatcom County* 125 Wn.2d 345, 351 (1994). The Court of Appeals has recognized that the scope of the "development regulations" covered by *Brisbane* is very broad and covers regulations of the sort implemented by three ordinances at issue in this case. *Yes for Seattle*, 122 Wn. App. 382, 390-91

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(2004), *petition for rev. filed*, (July 23, 2004). Moreover, the courts have consistently conducted pre-election review of the lawfulness of initiatives and referenda *prior* to an election. *Anderson I* at 156-159; *Brisbane* at 351-55; *Yes for Seattle* at 386-87. In accordance with this binding precedent, King County respectfully requests this Court grant its motion for summary judgment.[1]

2. Pre-election review is appropriate and necessary.

The law is clear that courts appropriately conduct pre-election review to determine whether a proposed initiative or referendum is legally permissible. Defendant notes that pre-election review is discouraged in some contexts. King County does not dispute this and explicitly acknowledged this point in its motion for summary judgment. A well-established exception, however, permits judicial review of proposed initiatives or referenda to determine whether they are *beyond the scope of the initiative or referendum power*. It is pursuant to this long-recognized exception that the courts conducted pre-election review in *Andersen, Brisbane* and *Yes for Seattle* and that King County requests pre-election review in this case.

In arguing that pre-election review should not be allowed, Defendant relies heavily on *Philadelphia II v. Gregoire*, 128 Wn.2d 707, 716-17, *cert. denied*, 519 U.S. 862 (1996). Defendant's citations to this case, however, are incomplete and misleading. As discussed in detail in the County's motion for summary judgment, *Philadelphia II* specifically permits pre-election review to determine whether an initiative is within the scope of the initiative authority:

> Generally, courts are reluctant to rule on the validity of an initiative before its adoption by the people. . . . *However, an established exception to this rule in Washington is that a court will review a proposed initiative to determine if it is beyond the scope of the initiative power.*

[1] Defendant spends several pages of his response brief responding to arguments that the County has not raised (e.g., whether the ordinances are "legislative acts"). King County does not address these undisputed issues; nor does it address arguments that are premised on overruling appellate decisions, because that is beyond the jurisdiction of this Court. The validity of these decisions was discussed in the County's summary judgment motion. King County reserves the right to address all of these issues in any future proceedings.

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Philadelphia II at 716-17 (emphasis added). This "established exception" – and the case law and policy rationale that support it – is simply ignored by the defendant.

The defendant also argues, relying on *Wash. State Labor Council v. Reed*, 149 Wn.2d 48 (2003), that review should be delayed until after the election when "more factual detail can be developed." *Reed*, however, involved a set of unique and non-GMA related facts. Reliance on *Reed* in the GMA context has been explicitly rejected by *Yes for Seattle*, 122 Wn. App. at 386-87, another highly relevant case that, in terms of its holding on pre-election review, that is also ignored by the defendant. In *Yes for Seattle* the Court of Appeals reaffirmed the "established exception" of *Philadelphia II*. Further, the Court in *Yes for Seattle* emphasized that pre-election review is particularly appropriate when, as here, there will be no opportunity for meaningful post-election review. *Id.* In the present case, given the significant cost of the election process and the regulatory confusion that would result if review is delayed, pre-election review is appropriate.

Defendant argues that the County's position would create a situation in which pre-election review is no longer a rare event. Pre-election review to determine whether referenda are beyond the scope of the referendum power has been permitted for over ninety years in Washington; it has never been a "rare" event. *See Philidelphia II*, 128 Wn.2d 717.

In the final analysis, pre-election review of referenda relating to land use development regulations has been held appropriate and conducted in all the relevant cases – including *Andersen, Brisbane* and *Yes for Seattle* – because the scope of the proposed review is appropriately narrow. The County is not asking this court to review the proposed ballot measures to determine whether they are substantively flawed. Any substantive questions are

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appropriately addressed after an election. Whether there is authority to place the referenda on the ballot, however, is a narrow legal question that is ripe for pre-election review.

3. Land use development regulations are not subject to ballot initiatives.

The Defendant – after arguing that it should be overruled – contends that *Brisbane* is distinguishable on the grounds that two of the three ordinances in the present case were not mandated by specific requirements of the Growth Management Act. The County disagrees with this conclusion, and the incorrect assumptions and analysis employed to reach it.[2] Nevertheless, it is not necessary to resolve these issues to grant summary judgment in favor of the County because this argument has been raised and rejected in *Yes for Seattle*:

> Yes for Seattle urges us to distinguish this case from *Anderson* and *Brisbane* because in those cases, the referenda were attempting to repeal ordinances enacted under *specific requirements* of the GMA. The City argues this is a distinction without a difference. We agree with the City.

Yes for Seattle at 389 (emphasis added). The Court went on to examine the GMA definition of "development regulation" and concluded that it was very broad. The Court held that while the City's creek regulations may not have been mandated by a specific provision of the GMA, they were nevertheless GMA development regulations and thus, pursuant to *Anderson* and *Brisbane*, not subject to modification by initiative. *Id.* at 389-92.

The reasoning and analysis of the Court in *Yes for Seattle* applies with equal force in the present case. Regardless of whether the grading, clearing, or storm water requirements of the

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[2] Briefly, these three ordinances are functionally and scientifically linked and work as a whole to provide protection of environmentally significant areas. Two of the ordinances - 15051 and 15053 – regulate what activities are allowed within critical areas and critical area buffers and under what circumstances those activities require permits from the County. The third ordinance – 15052 – regulates activities wherever they occur, including within critical areas, that create flooding and cause runoff that pollutes wetlands, streams, and other critical areas. There is no requirement in the GMA that the County only protect its critical areas through something called a "critical areas ordinance." *The requirement is that it protect the functions and values of critical areas*, RCW 36.70A.060, and *that it include best available science in its development regulations that protect critical areas*, RCW 36.70A.172. The ordinances satisfy these GMA imposed requirements.

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ordinances were specifically mandated by the GMA, they unequivocally fall within the GMA's definition of "development regulation." As such, and for the reasons fully discussed in the County's opening brief, they are not subject to review by referenda.

4. Defendant's constitutional issue is without merit.

Defendant also argues that the Growth Management Act is unconstitutional. This argument is not properly before the Court because Defendant has not provided notice of this claim to the Attorney General. *See* RCW 7.24.100. In any event, the argument is without merit because the opportunity to subject local legislative measures is a product of the King County Charter; there is no common law or state constitutional right at issue. *See, e.g.*, RCW 35.22.200 (authorizing, but not requiring, certain local governments to provide for local initiatives and referenda). Moreover, there is no requirement that the titles of state statutes explicitly reflect that they may modify or otherwise limit local legislative activity. Finally, under principles of supremacy, King County must comply with state law, which in this case means not subjecting land use development regulations to ballot measures.

5. *Yes for Seattle* is on-point and controlling.

Perhaps recognizing the significance of Y*es for Seattle*, the Defendant attempts to distinguish this all-important case by suggesting that *Yes for Seattle* should not be followed because it involved an initiative rather than a referendum. Of course, when the Defendant wants to cite an initiative case, such as *Philadelphia II*, to support his position this distinction is ignored. In any event, the Court's conclusion in *Yes for Seattle* was based squarely on the holdings in *Brisbane* and *Anderson*, both of which were *referendum* cases. Washington case law applies the limit on ballot initiatives equally to initiates and referenda; there is no controlling authority to the contrary.

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DATED this _____ day of January, 2005.

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